

**STATE OF INDIANA  
BEFORE THE INDIANA ALCOHOL AND TOBACCO COMMISSION**

|   |   |                              |
|---|---|------------------------------|
| <b>IN THE MATTER OF</b>                 | ) |                              |
| <b>THE PERMIT OF</b>                    | ) |                              |
|   | ) |                              |
| <b>WAL-MART STORES EAST, LP</b>         | ) |                              |
| <b>d/b/a WAL-MART SUPERCENTER #1341</b> | ) |                              |
| <b>335 SOUTH RED BANK ROAD</b>          | ) | <b>PERMIT NO. DL82-21381</b> |
| <b>EVANSVILLE, INDIANA 47712</b>        | ) |                              |

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

**I. BACKGROUND OF THE CASE**

The Applicant, Wal-Mart Stores East, LP, d/b/a Wal-Mart Supercenter #1341 (“Applicant”), located at 335 South Red Bank Road, Evansville, Indiana 47712, permit number DL82-21381, is the Applicant for a type 115<sup>1</sup> Alcohol & Tobacco Commission (“Commission”) permit. The application was assigned to the Alcoholic Beverage Board of Vanderburgh County (“Local Board”). The Local Board held a hearing on December 13, 2004; and, on December 29, 2004 voted 3-1 to deny the application. The Commission adopted the Local Board’s recommendation on April 6, 2005.

The Applicant filed a timely Notice of Appeal and the matter was assigned to Commission Hearing Judge U-Jung Choe (“Hearing Judge”). Applicant filed a Petitioner’s Motion for Reconsideration of Alcohol and Tobacco Commission’s Denial on April 19, 2006; and, filed a Request for Administrative Review and Request to Appeal Commission’s Denial of Application on May 3, 2005. The Hearing Judge stayed the proceedings on August 1, 2005 pending resolution of *Ind. Ass’n of Beverage Retailers, Inc. v. v. Ind. Alcohol and Tobacco Comm’n*, 836 N.E.2d 255 (Ind. 2005).

On November 17, 2005, Applicant filed Petitioner’s Motion for Reconsideration of Alcohol and Tobacco Commission’s Permit Denial which was subsequently denied. On September 20, 2006, Applicant filed Petitioner’s Motion for Administrative Review and Request for the Issuance of Findings of Fact. The Hearing Judge (i) denied applicant’s motion for reversal of the Commission’s decision; (ii) found Petitioner to be the only party to the appeal; and (iii) ordered a prehearing conference which was held on September 21, 2006. The matter was set for hearing on November 28, 2006 and at that time, witnesses were sworn, evidence was heard and the matter was taken under advisement. The Hearing Judge, having

reviewed the tape-recorded transcript of the Local Board hearing (“LB Hearing”), the evidence submitted to the Commission during the appeal hearing (“ATC Hearing”), and contents of the entire Commission file (“ATC File”), now tenders her Proposed Findings of Fact and Conclusions of Law to the Commission for its consideration.

## **II. EVIDENCE BEFORE THE LOCAL BOARD**

A. The following individuals testified before the Local Board in favor of the Applicant in this cause:

1. Lisa Goldner, attorney for Wal-Mart;
2. Ralph Kurchoff, store manager for Wal-Mart;
3. Tammy Loehr, Wal-Mart employee;
4. Robert Thomas, Wal-Mart employee;
5. Pam Cheaney, Wal-Mart employee;
6. Marquette Goodwin, Wal-Mart employee;
7. Steve Davis, Wal-Mart employee; and,
8. Jackie Grades, Wal-Mart employee.

B. The following individuals testified before the Local Board against the Applicant in this cause:

1. Steve Bagby, Remonstrator;
2. Michael Lockard, Remonstrator;
3. Cindy Brackett, Remonstrator;
4. Bill Lockard, Remonstrator;
5. Andrew Lockard, Remonstrator;
6. Jerry Feldpausch, Remonstrator; and,
7. Shirley Lockard, Remonstrator.

C. The following evidence was introduced and admitted before the Local Board in favor of the Applicant in this cause:

1. Manager’s Statement by Ralph Kurchoff, Store Manger;
2. Photos inside of store;
3. Petitions gathered on behalf of Wal-Mart; and,
4. Email from Commission Hearing Judge Mark Webb disfavoring competitive remonstrance.

D. The following evidence was introduced and admitted before the Local Board against the Applicant in this cause:

1. Youth Access to Alcohol Fact Sheet;
2. Article – Characteristics, Policies and Practices of Alcohol Outlets and Sales to Underage Persons;
3. Article – Alcohol Use by Persons Under the Legal Drinking Age of 21;
4. Article – Minimum Legal Drinking Age Laws: A Brief Review of the Literature;
5. Article – Commercial Availability of Alcohol to Young People: Results of Alcohol Purchase Attempts;
6. Article – Alcohol Outlet Policies and Practices Concerning Sales to Underage People;
7. Article – Sources of Alcohol for Underage Drinkers;
8. Article – The Ability of Young People to Purchase Alcohol Without Age Identification in Northeastern Minnesota, USA;
9. Evansville City Council Resolution C-2004-4 – A Resolution Opposing the Expansion of Alcohol Outlets;

---

<sup>1</sup> Beer and wine (grocery) dealer located in an incorporated area. Ind. Code § 7.13-5-2(a).

10. Article – Council to Get Resolution Aimed at Convenience Store Alcohol Sales;
11. Letter from Eastview Neighborhood Association President, Christopher D. Cooke;
12. Letter from Mary C. Kixmiller, President of Tepe Park Neighborhood Association;
13. Email from Suzanne Crouch in support of Resolution C-2004-4;
14. Vanderburgh County Board of Commissioners Resolution CO.R-03-04-008 – A Resolution Opposing the Expansion of Alcohol Outlets;
15. Letter from State Representative Vaneta Becker regarding definition of a grocery store;
16. Email from Diane Spradley in support of resolutions restricting the sales of alcoholic beverages;
17. Article – Parents Must Act Responsibly on Teenage Drinking;
18. Letter from Paul W. Farmer, Chairman of United Neighborhoods of Evansville;
19. Article – The Effect of Enforcement on Merchant Compliance with the Minimum Legal Drinking Age Law;
20. Article – Preventing Underage Alcohol Access: Essential Elements for Policy, Deterrence and Public Support;
21. Article – Regulatory Strategies for Preventing Youth Access to Alcohol: Best Practices;
22. Article – Reducing Third Party Transactions of Alcohol;
23. Article – Alcohol Beverage Control Enforcement: Legal Research Report;
24. Article – How to Use Local Regulatory and Land Use Powers to Prevent Underage Drinking;
25. Article – National Evaluation of the Enforcing Underage Drinking Laws Program: Design and Baseline Data;
26. Memorandum from Steve Westbay to the Planning and Zoning Commission;
27. Article – the Wal-Mart Effect;
28. Article – the Wal-Mart You Don’t Know;
29. Article – Smart Growth for Louisiana;
30. Article – Shopping for Subsidies: How Wal-Mart Uses Taxpayer Money to Finance its Never-Ending Growth;
31. Article – Hidden Cost of Wal-Mart Jobs;
32. Article – Wal-Mart and County-Wide Poverty;
33. Article – The Marketing System;
34. Article – Times and Trends, A Snapshot of Trends Shaping the CPG Industry;
35. Article – Oakland v. Wal-Mart;
36. Article – Impact of Wal-Mart Supercenter on a Traditional Supermarket: An Empirical Investigation;
37. Article – The Impact of Wal-Mart Supercenter Food Store Sales on Supermarket Concentration in the U.S. Metropolitan Areas;
38. Article – Inner City Press, Wal-Mart;
39. Article – Every Day Low Wages: The Hidden Price We All Pay for Wal-Mart;
40. Article – Wal-Mart: A Destructive Force for Chicago Communities and Companies; and,
41. Letter from Dale Maddux, Interim Pastor of Grace Baptist Church.

### **III. EVIDENCE BEFORE THE COMMISSION**

A. The following individuals testified before the Commission in favor of the Applicant in this cause:

1. Lisa Goldner, Attorney for Wal-Mart;
2. Alex Intermill, Attorney for Wal-Mart;
3. Galen G. Dahler, Wal-Mart employee;
4. Lori Carr, Wal-Mart employee;
5. Peggy Seals, Wal-Mart employee;
6. Tammy Loehr, Wal-Mart employee; and,
7. Joseph Goodrid, Wal-Mart employee.

B. The following individuals testified before the Commission against the Applicant in this cause:

None.

C. The following evidence was introduced and admitted before the Commission in favor of the Applicant in this cause:

1. Wal-Mart Supercenter #1341 fact sheet summarizing security measures;
2. Manager's Statement by Galen Dahler;
3. 2004 Customer Petitions;
4. 2006 Customer Petitions;
5. Letters of Support;
6. Article – Study: Wal-Mart is Now Indiana's Top Employer;
7. Indiana Alcohol Quantity Limits;
8. Wal-Mart signage referencing state and federal alcoholic beverage laws;
9. Wal-Mart Facts – Indiana Community Impact;
10. Article – Wal-Mart Saves Working Families \$2,329 Per Year: Has Net Positive Impact on Real Wages and Job Creation;
11. Article – Nation's Best Educators Honored in Wal-Mart's 11<sup>th</sup> Annual Teacher of the Year Program;
12. Article – Statement on Poll Showing Americans Believe Wal-Mart is a Good Place to Shop; and,
13. Wal-Mart Charitable Giving Summary.

D. The following evidence was introduced and admitted before the Commission against the Applicant in this cause:

None.

#### **IV. FINDINGS OF FACT**

1. The Applicant, Wal-Mart Stores East, LP, d/b/a Wal-Mart Supercenter #1341, 335 South Red Bank Road, Evansville, Indiana 47712, permit number DL82-21381, is the applicant for a type 115 Commission permit. (ATC File).
2. The Applicant maintains a reputation for decency and law obedience in the community in which it conducts business. 905 IAC 1-27-1 and Ind. Code § 7.1-3-9-10. (ATC Hearing).
3. There is a need for the services of the Applicant at the proposed permit premises. 905 IAC 1-27-4(a). (ATC Hearing).
4. The neighborhood and community desire to receive the services of the Applicant at the proposed permit premises. 905 IAC 1-27-4(b). (ATC Hearing).
5. The services of the Applicant at the proposed permit premises would have a positive impact on the neighborhood or community in which it is proposed to be located. 905 IAC 1-27-4(d). (ATC Hearing).
6. The proposed permit premises is more than 200 feet from a church or school. Ind. Code § 7.1-3-21-11. (ATC File).
7. The proposed permit premises is not in a residential district as referred to in Ind. Code § 7.1-3-19-13 and 905 IAC 1-18-1. (ATC File).

8. The Applicant's stores are similar to stores of competitors holding alcoholic beverage permits in Indiana. (LB Hearing, ATC Hearing and ATC File).
9. The Applicant submitted petitions collected in 2004 of approximately one thousand six hundred seven (1,607) signatures of Wal-Mart customers with 78.22% in favor of the issuance of the permit. (ATC Hearing).
10. The Applicant submitted petitions collected in the fall of 2006 of approximately two thousand six hundred four (2,604) signatures of Wal-Mart customers with 99% in favor of the issuance of the permit. (ATC Hearing).
11. The Local Board's proffered basis for denial of the permit was (i) 905 IAC 1-27-4(a) – no need for services at this location; (ii) 905 IAC 1-27-4(b) – no desire of the neighborhood or the community to receive services; (iii) 905 IAC 1-27-4(c) – impact of such services on other business in the neighborhood or community; and, (iv) 905 IAC 1-27-1 – determination of reputation and character; however, the weight of the evidence at the LB Hearing contradict that conclusion. (LB Hearing).
12. Specifically, the Local Board expressed concerns regarding (i) Wal-Mart being a “family store”; (ii) the unfairness of applying stricter standards of oversight for package stores as opposed to grocery stores; (iii) southern Indiana having especially acute problems with alcoholic beverage abuse; and, (iv) the inadequacy of Thirty Five Thousand Dollars (\$35,000) in charitable donations to the local community. (LB Hearing).
13. Any Finding of Fact may be considered a Conclusion of Law if the context so warrants.

## **V. CONCLUSIONS OF LAW**

1. The Commission has jurisdiction over this matter pursuant to Ind. Code § 7.1-1-2-2 and Ind. Code § 7.1-2-3-9.
2. The permit application was properly submitted pursuant to Ind. Code § 7.1-3-1-4.
3. The Commission is authorized to act upon proper application. *Id.*
4. The Hearing Judge may take judicial notice of the Commission file relevant to a case, including the transcript of proceedings and exhibits before the local board. 905 IAC 1-36-7(a).
5. The Hearing Judge conducted a *de novo* review of the appeal on behalf of the Commission including a public hearing, and a review of the record and documents in the Commission file. Ind. Code § 7.1-3-19-11(a); 905 IAC 1-36-7(a), -37-11(e)(2); *see also* Ind. Code § 4-21.5-3-27(d).

6. Evidence at the hearing was received in accordance with the Indiana Administrative Code and the Commission's rules. The findings here are based exclusively upon the substantial and reliable evidence in the record of proceedings and on matters officially noticed in the proceeding. 905 IAC 1-37-11(e)(2); Ind. Code § 4-21.5-3-27(d).
7. The Applicant is a fit and proper applicant, has maintained a reputation for decency and law obedience and is well qualified to hold an alcoholic beverage permit under Indiana law. 905 IAC 1-27-1 and Ind. Code § 7.1-3-9-10.
8. Applicant is of good moral character and in good repute in the community in which it does business and is qualified to hold the permit it seeks. Ind. Code § 7.1-3-4-2(a)(2)(A).
9. The proposed permit premises are not in a residential district. Ind. Code § 7.1-3-19-13 and 905 IAC 1-18-1.
10. The proposed permit premises are more than 200 feet from a church or school. (ATC File). Ind. Code § 7.1-3-21-10 and Ind. Code § 7.1-3-21-11.
11. The Applicant is not disqualified from holding a Commission beer and wine grocery permit. Ind. Code § 7.1-3-4-2; Ind. Code § 7.1-3-5-2 and Ind. Code § 7.1-3-15-2.
12. In determining whether to issue a permit, the Commission may consider the geographic desirability of a proposed permit location, the need for the permit at the proposed location, the community's desire for the permit, and the impact of the permit on the community and other businesses. 905 IAC 1-27-4.
13. The Commission may consider both a need and desire for the permit in determining whether a permit should be issued in a particular matter. *Id.*
14. "Need" means whether the services are available at the location or in some close geographic proximity. 905 IAC 1-27-4(a).
15. "Desire" means whether individuals would purchase those products at that location, if they were available. 905 IAC 1-27-4(b).
16. A determination of whether there exists a need and desire for the services at the location in question turns on the facts of each case. *Id.*
17. Where an Applicant shows that customers would be willing to purchase alcoholic beverages if they were available for sale, such evidence constitutes a desire to receive such services at that location. 905 IAC 1-27-4(b).

18. There is a need for a beer and wine grocery permit at the Applicant's location. 905 IAC 1-27-4 (a).
19. The neighborhood and community desire to receive the services of an alcoholic beverage permit at the Applicant's location. 905 IAC 1-27-4(b)
20. All laws shall be general and administered with uniform application throughout the State. Ind. Constitution, Art. IV, Sec. 23; *See also, Indiana Alcoholic Beverage Commission v. Osco Drug*, 431 N.E.2d 823, 831 (Ind. App. 1982).
21. To deny the application to Applicant while granting other similarly situated applicants' applications would be arbitrary and capricious and otherwise not in accordance with the law. Ind. Code § 7.1-3-19-11.
22. The Local Board denied this application without sufficient evidence to support a finding that this permit should not be issued.
23. A local board's recommendation is clearly erroneous when there is a lack of substantial evidence to support the recommendation. Ind. Code § 7.1-3-19-11.
24. The Commission may decline to follow the recommendation of a local board where the recommendation is not based upon substantial evidence. *Id.*
25. The Applicant has submitted substantial evidence that it is qualified to hold a Commission Type 115 grocery beer and wine permit. (LB Hearing and ATC Hearing).
26. The Commission may reverse a local board's action in denying an application for a permit if it finds that the local board's decision was (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (b) contrary to constitutional right, power, privilege, or immunity; (c) in excess of, or contrary to, statutory jurisdiction, authority, limitations or rights; or (d) without observation of procedure required by law, or unsupported by substantial evidence. Ind. Code § 7.1-3-19-11.
27. The Local Board's action in denying the application of the permit of this Applicant in this matter was (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (b) contrary to constitutional right, power, privilege, or immunity; (c) in excess of, or contrary to, statutory jurisdiction, authority, limitations or rights; (d) without observance of procedure required by law; and/or (e) unsupported by substantial evidence.
28. Any Conclusion of Law may be considered a Finding of Fact if the context so warrants.

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the finding of the Local Board to recommend denial of the permit application of the Applicant in this matter was arbitrary and capricious, not based on substantial evidence and contrary to law and cannot be sustained. It is further Ordered, Adjudged and Decreed that that the evidence adduced at the ATC Hearing was in favor of the Applicant and against the recommendation of the Local Board. The appeal of Applicant, Wal-Mart Stores East, LP, d/b/a Wal-Mart Supercenter #1341, 335 South Red Bank Road, Evansville, Indiana 47712 for the application of this Type 115 permit no. DL82-21381 is approved, the recommendation of the Local Board in this matter is reversed, and the permit applied for herein is hereby GRANTED.

DATED: \_\_\_\_\_

\_\_\_\_\_  
U-Jung Choe, Hearing Judge